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May 27, 2004

Ex Parte Filing: By Electronic Mail

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: *Section 251 Unbundling Obligations for Incumbent Local Exchange Carriers*, CC Docket No. 01-338; *Implementation of Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98; *Deployment of Wireline Services Offerings Advanced Telecommunications Capability*, CC Docket No. 98-147; *Petition for Forbearance of Sections 251(c)(3), (c)(4), and (c)(6) in New Build, Multi-Premises Development*, WC Docket No. 03-220

Dear Ms. Dortch:

I am writing on behalf of AT&T Corp. to respond to a recent filing by Verizon in support of BellSouth's Petition for Reconsideration of the Commission's *Triennial Review Order* ("TRO").¹ Verizon urges the Commission to revise its unbundling rules with respect to loops serving multi-unit premises (MUPs) in order to encourage ILECs to develop and deploy more fiber facilities to MUPs. According to Verizon, the Commission should change its rules so that fiber loops deployed to a MUP need not be unbundled, so long as the MUP is deemed to be "primarily residential." See Verizon May 20 *Ex Parte* at 1.

The Commission's existing rules already are designed to provide incumbent LECs with incentives to deploy broadband, and the rewrite that the Bells seek would do absolutely nothing more to encourage broadband deployment either as a general matter or to MUPs specifically. Rather, the only effect of these proposals to further limit loop unbundling would be

¹ See *Ex Parte* Letter from Dee May, Verizon, to Marlene Dortch, FCC, CC Docket No. 01-338, *et al.* (May 20, 2004) ("Verizon May 20 *Ex Parte*").

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to create a gaping exception to the Commission's rules that DS1 and most DS3 loops used to serve enterprise customers must be unbundled.

To begin with, both BellSouth's initial petition for reconsideration and Verizon's effort to limit and thereby resuscitate it are fundamentally flawed. In each case, these proposals seek to extend the regulatory relief that the Commission found appropriate only for true "greenfield" fiber-to-the-home ("FTTH") deployments used to serve mass market customers and apply that relief to loop arrangements that are ordinarily used today to serve enterprise customers.

In the *TRO*, the Commission attempted to develop unbundling rules for mass market loops that would create a regulatory incentive for "broad replacement" of existing loop plant used in the mass market with new deployments of nascent FTTH technology, which the Commission predicted would likely produce consumer benefits in the form of true next-generation services.² Thus, the *TRO* and the Commission's rules provide that, in true greenfield deployments of FTTH to the mass market, ILECs are not required to unbundle the loop. *TRO* ¶ 275. In brownfield situations where ILECs overbuild with entirely fiber loops to the mass market, ILECs need not provide access to the fiber, but must maintain copper or, if it is retired, provide a 64 kbps transmission path capable of providing voice grade services. *Id.* ¶¶ 276-77. Under the rationale adopted by the Commission in the *TRO*, limiting unbundling requirements for mass market loops in this fashion would "give[] incumbent LECs an incentive to deploy fiber" and the associated electronics necessary to "develop new broadband offerings for mass market customers." *Id.* ¶ 290 (emphasis added).³

The reconsideration that the Bells seek regarding MUPs is patently inconsistent with the Commission's *TRO* rationale. Under their view, *any* fiber loop deployed to a MUP (or, in Verizon's case, to a MUP deemed by Verizon to be "primarily" residential) would be subject

² See *TRO* ¶¶ 219, 240 (mass market customers can obtain a full "suite of services" with FTTH facilities); *id.* ¶¶ 240, 274, 276 & nn.805, 807, 812 (citing various comments and studies that purported to show that FTTH could deliver the bandwidth that would enable new "cutting edge applications" such as "telemedicine" and "real-time video feeds of instructor lessons," "virtual reality," and "Internet appliances" (HTBC Comments at 6-7, 15) and that purported to demonstrate that FTTH was economical because it could be used to provide the same capabilities as digital cable (including video on demand and high definition TV) and broadband Internet access of speeds up to 20 Mbps (CSMG Study at 10, 18-24 (attached to Corning Nov. 26, 2002 *Ex Parte* Letter))).

³ The *TRO* was also very clear that the rules applicable to FTTH applied only to loops that were in fact "entirely" made of fiber and that were capable of producing the true next generation services described by the Commission and by commenters like Corning and HTBC. See *TRO* ¶¶ 219, 273 & nn.802, 811. Intermediate fiber architectures, including fiber-to-the-curb, were specifically "excluded" from the FTTH rules. *Id.* As AT&T and other parties have shown, BellSouth's request to change the fiber-to-the-home rules to a "fiber-in-the-vicinity" regime is likewise inconsistent with the rationale of the *TRO* rules and should also be rejected. See, e.g., AT&T Opp. at 6-15 (Nov. 6, 2003); Letter from Rebecca Sommi, *et al.*, to FCC Commissioners, CC Docket No. 01-338 *et al.*, at 1-2 (May 26, 2004) (under BellSouth's proposal, "copper traveling over hundreds or thousands of feet will be deployed," making BellSouth's proposal "no different than a normal hybrid loop deployment").

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to the reduced unbundling obligations for FTTH, even if the building also contains enterprise customers served by DS1s that would otherwise be subject to unbundling. But as AT&T and others have explained, the Commission made clear and unambiguous distinctions between loops that serve the mass market and loops used to serve enterprise customers. *See, e.g., TRO* ¶ 197 & n.624; *compare TRO* ¶¶ 211-97 with *id.* ¶¶ 298-342. All-fiber loops that are deployed to enterprise customer locations are loops that must be unbundled pursuant to the Commission's rules on dark fiber, DS-1, DS-3 and higher capacity loops. *See TRO* ¶¶ 298-342; *id.* ¶ 325 n.956. The rules that provide for less unbundling for FTTH loops simply do not apply to enterprise customers – whether they are housed in stand-alone buildings or in MUPs. This is obvious from the text of the *TRO* and compelled by the rationale behind the Commission's FTTH rules.⁴ There is plainly no need to provide regulatory incentives for carriers to build all-fiber loops to enterprise customers, and thus section 706 is irrelevant to the Bells' requests to revise the rules applicable to MUPs. Further, it is difficult to see how the relief the Bells are requesting would encourage *more* deployment of FTTH to mass market customers in MUPs.⁵ Accordingly, granting the relief requested by BellSouth and Verizon would not in the least encourage additional deployment to the mass market of fiber, electronics, and true next-generation services, including the "variety of new services and applications" that the Commission believed would be "enable[d]" by its existing rules. *See TRO* ¶ 276.

For these reasons, Verizon's proposal to exempt from unbundling any all-fiber loops deployed to a MUP with "primarily residential" tenants would fail even if that test were practicable. But in fact, Verizon's proposal to apply a "primarily residential" test to MUPs would be impossible to administer and would produce absurd results.

Verizon's "primarily residential" proposal would not at all provide the "objective, bright-line" standard applicable to MUPs that Verizon itself has insisted is needed.⁶ To the contrary, determining whether a particular MUP is "primarily residential" would prove impossible in practice and would spawn vast numbers of disputes involving peripheral and often unverifiable facts. Verizon itself offers no insight into how its standard should be applied,

⁴ The FTTH unbundling regime was set forth in the mass market loop section of the *TRO* and thus any clarification of that regime can extend only to mass market customers. Further, the Commission's discussion of TDM-based technologies does not change this. That discussion likewise is found only in the mass market loop section of the *TRO*, which plainly states that "that the line drawing in which we engage does not eliminate the existing rights competitive LECs have to obtain unbundled access to hybrid loops capable of providing DS1 and DS3 service to customers." *TRO* ¶ 294. As MCI correctly points out, BellSouth's request to clarify the TDM aspects of the *TRO* is itself entirely vague and, if granted, would cause serious confusion regarding access to TDM capabilities. *See* Letter from Henry G. Hultquist, MCI, to Marlene Dortch, FCC, CC Docket No. 01-338 *et al.* (May 25, 2004).

⁵ If the Bells were correct that additional relief is warranted, the Commission would have to conclude that it is now more likely that the Bells would deploy FTTH to an all-residential MUP than to a MUP with an approximately equal mix of mass market and enterprise customers. That makes no sense, and the Bells have certainly provided no evidence that this is true or rational.

⁶ *See* Letter from William P. Barr, Verizon, to Hon. Michael Powell, at 4 (Jan. 7, 2004) attached to *Ex Parte* Letter from Ann Berkowitz, Verizon, to Marlene Dortch, FCC, CC Docket No 01-337, *et al.*, (Jan. 7, 2004).

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making only a vague reference to whether the “tenants” are residential customers. May 20, 2004 *Ex Parte* at 1. Of course, that comes nowhere close to deciding whether a particular MUP is “primarily residential” – is it to be determined by a simple headcount of residential customers (and, if so, would the count include only each unit in the MUP or each and every resident/employee in the MUP?), by comparison of the amount of space in the MUP controlled by residential customers versus enterprise customers, by comparison of the rents paid by residential versus enterprise customers, or by potential (or actual) telecommunications revenues attributable to residential and enterprise customers?⁷ As just these few examples show, Verizon’s proposed “primarily residential” standard is unworkable and would, indeed, prove to be a powerful anticompetitive weapon to Verizon and other ILECs, who would invariably abuse the haziness of the proposed standard to insist that virtually any building with residential tenants is “primarily” residential.

Verizon’s proposal should also be rejected because it would lead to utterly absurd results. For example, if an enterprise customer that is served with a DS1 happens to occupy the ground floor of a MUP that contains 12 floors of residential apartments (and the MUP is deemed to be “primarily residential” under some test yet to be described), there would be no unbundling requirement for those enterprise facilities. At the same time, if the enterprise customer moved next door to an office building that contained no residences, unbundling of the DS1 loop used to serve the customer would be required. That is not only arbitrary, but contrary to the letter and purpose of the *TRO*, which plainly requires unbundling of DS1 loop facilities, “regardless of technology.”⁸ Moreover, the proposed standard is so vague that Verizon and other ILECs could be expected to insist that virtually any MUP with residential tenants is “primarily” residential

Because of these absurdities and difficulties in administration, the Commission should abandon any reconsideration of its unbundling rules based on Verizon’s “primarily residential” test. The Commission’s rules are clear: the rules that limit unbundling of FTTH loops apply only to loops used to serve mass market customers, not enterprise customers. Application of those rules to MUPs is straightforward: all-fiber loops used to serve enterprise customers in MUPs must be unbundled (so long as there is impairment). All-fiber loops to mass-market customers in MUPs to which all the greenfield considerations apply are not unbundled.⁹ In fact, Verizon’s alternative proposal recognizes this very rule, claiming that the Commission should provide that “any customer who is part of the mass market continues to be classified as a

⁷ And of course, under the Bells’ view, these determinations could not be delegated to state commissions, but would have to be made by the Commission itself.

⁸ See *TRO* ¶ 325 & n.956. Of course, the results might be equally arbitrary in ways that Verizon would find objectionable: if five 3-line DS0-level small business customers shared space in a newly constructed commercial building with no residences, the ILEC would be required to unbundle even all-fiber loops that it deploys to the small business customers.

⁹ See Letter from J. Marsh, AT&T, to Marlene Dortch, FCC, CC Docket No. 01-338, *et al.* (filed May 20, 2004); Letter from A. Renee Callahan, to Marlene Dortch, FCC, CC Docket No. 01-338 (filed Jan. 8, 2004) (letter on behalf of numerous parties explaining the brownfield/greenfield distinction in the *TRO*).

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mass market customer.” Verizon May 20 *Ex Parte* at 1. By the same token, loop facilities used to serve enterprise customers are unbundled, even when the customers occupy a multi-use MUP. That is how the Commission’s rules are currently written, and that is how they should continue to be applied.

Sincerely,

/s/ Michael J. Hunseder

Michael J. Hunseder

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